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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re the Andersen Family Trust	
STEPHEN ANDERSEN et al., Plaintiffs and Respondents, v. PAULINE HUNT et al., Appellants.	B286565/consolidated with B286867 (Los Angeles County Super. Ct. No.BP099392)

APPEAL from orders of the Superior Court of Los Angeles County, William Barry, Judge. Reversed in part, remanded in part with instructions and affirmed in part.

Evan D. Marshall for Appellants.

Law Offices of John A. Belcher and John A. Belcher for Plaintiffs and Respondents Stephen Andersen and Kathleen Brandt.

Wayne Andersen died in 2006, leaving behind a trust containing more than $1 million in assets. The three named trust beneficiaries, Wayne's[1] adult children, Stephen Andersen and Kathleen Brandt, and his romantic partner, Pauline Hunt, have been locked in contentious litigation ever since.[2] As the litigation entered its second decade, Stephen and Kathleen jointly filed a petition for final distribution of the trust assets. Pauline opposed the asset allocation they proposed. In addition, she filed a petition seeking more than $500,000 in attorney fees and costs she incurred during her tenure as trustee, which ended in 2009. Stephen and Kathleen opposed the fee request.

The trial court granted the petition for distribution. It divided the assets as dictated by the trust, 60 percent to Pauline and 40 percent to Stephen and Kathleen collectively, but made numerous deductions from Pauline's share to reimburse the trust for assets she diverted while serving as trustee. The court awarded 100 percent of the interest accrued on the diverted assets directly to Stephen and Kathleen. When the assets were distributed, Pauline, the 60 percent beneficiary, received $285,673.12, while Stephen and Kathleen, collectively 40 percent beneficiaries, received $1,017,469.01.

The trial court denied Pauline's petition for attorney fees in its entirety. The court gave several reasons for the denial,

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[1]We refer to the parties by their first names for clarity. No disrespect is intended.

[2]Pauline's adult grandson, Taylor Profita, also is involved in the litigation. His appeals of the trial court's orders sanctioning him and declaring him a vexatious litigant in connection with this case are separately pending before us. (See Case No. B290175 [appeal of vexatious litigant prefiling order]; Case No. B288078 [appeal of sanctions order].)

including the untimeliness of the petition, the unreasonableness of the fees, and Pauline's failure to demonstrate which, if any, of the fees were incurred for the benefit of the trust.

Pauline separately appealed the distribution and fee orders; we consolidated the appeals for purposes of record preparation, briefing, oral argument, and decision. In her appeal of the distribution order, Pauline contends the court erred by awarding Stephen and Kathleen 100 percent of the interest accrued on the diverted sums. We reach the merits of her argument, which is not moot, and reverse the distribution order. On remand, the interest accrued on sums diverted from the trust and estate must be divided pursuant to the terms of the trust, like other trust assets.

In her appeal of the fee order, Pauline argues that she incurred reasonable fees to protect the trust assets and effectuate Wayne's intent, and that the court ignored Wayne's intent and the express terms of the trust by denying them. She further contends that the denial of fees was an improper penalty for her "unrelated misfeasance" of diverting assets totaling approximately $375,000, and that Stephen and Kathleen were not prejudiced by her delay in seeking fees. We conclude that the trial court did not abuse its discretion and affirm the order.

We deny Stephen and Kathleen's request for judicial notice. None of the documents is material to our resolution of the issues presented by these two appeals. (See *Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 713.)

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This litigation, which Pauline's counsel has described as a "Kafkaesque nightmare," is beginning to rival the Dickensian

legal saga of *Jarndyce v. Jarndyce*,[3] an estate dispute that spanned generations and ended only when legal costs surpassed the value of the estate. This similarly long-running litigation has now outlived Pauline, who died in early 2018 after incurring over $800,000 in attorney fees. Her grandson, Taylor Profita, has taken her place.[4] We discuss only the portions of the 13-year history most pertinent to the instant disputes.

I. Andersen Family Estate Plan

Spouses Wayne and Harriett Andersen prepared an estate plan in 1992 by signing reciprocal pour-over wills and settling the Andersen Family Trust (the trust), into which the estate assets ultimately would pour. They placed into the trust corpus real property, bank and investment accounts, government bonds, and a life insurance policy. They named themselves as trustees and sole beneficiaries of the trust during their lives; they named their adult children Stephen and Kathleen successor co-trustees and beneficiaries. The trust directed the trustee to divide the trust into two subtrusts, "Trust A" and "Trust B," upon the death of the first spouse, for estate tax purposes.

II. Trust Amendments and New Accounts

Harriett died in 1993. Upon her death, her estate was

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[3]Dickens, Bleak House (1852-1853).

[4]At a May 12, 2017 hearing, Pauline's counsel apparently produced documentation showing that Taylor had held Pauline's power of attorney since 2008. This documentation is not in the appellate record. Stephen and Kathleen moved to dismiss the instant appeals on the basis of another 2008 document, disclosed for the first time after Pauline's death in February 2018, that assigned to Taylor all of Pauline's interests in and claims related to the trust. We address below the standing questions posed by Taylor's participation in the litigation.

poured over into the trust, of which Wayne became the sole trustee. Wayne did not divide the trust assets into Trust A and Trust B.

Wayne subsequently made a total of five amendments to the trust. The first, in 1996, designated Pauline to succeed him as trustee upon his incapacitation or death. Stephen and Kathleen were to succeed Pauline.

Wayne suffered a major stroke that affected his cognitive abilities on May 11, 2003. Shortly thereafter, he established several joint tenancy accounts with Pauline, to which he was the sole contributor of funds. He also amended the trust a second time, to change the beneficiaries and the proportion of trust assets they would receive upon his death. Pursuant to this amendment, made 17 days after his stroke, Pauline, not previously named as a beneficiary, was to receive 60 percent of the trust estate. Stephen and Kathleen, who prior to the amendment were to receive 50 percent each, were relegated to a collective 40 percent that was to be shared with Stephen's son John. This second trust amendment also stated that Wayne and Harriett had not intended to obligate the surviving spouse to fund subtrusts.

The third amendment, made in November 2003, named Sunny Asch and Noella Ballenger as successor trustees, and removed Stephen and Kathleen from any trustee role. It also added Taylor as a contingent trust beneficiary if Pauline predeceased Wayne. The fourth amendment, made in January 2004, reiterated that Wayne and Harriett did not intend to mandate division of the trust into Trust A and Trust B. The fifth and final amendment, made in July 2004, deleted John as a beneficiary.

III. Wayne's Death and Ensuing Litigation

Wayne suffered a second, catastrophic stroke in February 2006. He died on April 28, 2006.

A. Initial Litigation

Shortly after Wayne's death, Stephen and Kathleen, who have acted jointly throughout the entirety of these proceedings, commenced litigation by filing a petition under Probate Code section 17200.[5] In their operative third amended petition, Stephen and Kathleen alleged that Wayne violated his fiduciary duties by failing to subdivide the trust. They further alleged that the amendments to the trust and transfers of assets were invalid due to Wayne's lack of capacity and elder abuse and undue influence by Pauline and Taylor. In addition, Stephen and Kathleen alleged that Pauline breached her fiduciary duties as trustee by failing to subdivide the trust and by diverting assets. They requested an accounting.

Pauline denied the allegations of improper conduct. She also filed a section 17200 petition to construe and reform the trust to reflect Wayne and Harriett's alleged intention not to require the division of assets into subtrusts.

After a two-phase trial addressing both petitions, the trial court ruled that Pauline and Wayne did not breach their fiduciary duties by failing to subdivide the trust into Trust A and Trust B. It also found, however, that Wayne lacked the testamentary capacity to amend the trust after his first stroke, and that Pauline failed to show that the amendments were not the result of her undue influence. The trial court accordingly concluded that the four post-stroke amendments to the trust were

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[5]All further statutory references are to the Probate Code unless otherwise indicated.

void. The court further concluded that Pauline breached her fiduciary duties by transferring assets from the trust and estate into joint accounts and collecting the proceeds of Wayne's life insurance policy. It specifically stated, however, that it was "unable to find that Hunt's transfer of these assets, forgeries, false reimbursement claims, and concealment rise to the level of bad faith or intent to defraud the trustor, Wayne, and his heirs." The court ordered Pauline to hold the diverted assets in constructive trust. The court removed Pauline as trustee, effective April 15, 2009, and appointed a referee, Judge Arnold Gold (ret.), to determine the amounts properly chargeable to Pauline in light of her diversion of assets.

Pauline appealed both her removal as trustee and the court's substantive ruling. We dismissed her appeal of the removal order after she failed to file an opening brief. We heard her appeal of the substantive order, however, and issued a lengthy opinion in June 2011. In the published portion of the opinion, we concluded that the trial court evaluated Wayne's capacity to amend the trust under an incorrect standard. (*Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 726, 731.) We further concluded that the four post-stroke amendments were valid when evaluated under the correct standard, and directed the trial court to enter a new and different judgment affirming their validity. (*Andersen v. Hunt*, *supra*, 196 Cal.App.4th at p. 732.) We affirmed the remainder of the trial court's rulings, including its findings that Wayne lacked the capacity to make financial transfers and that Pauline breached her fiduciary duties. (*Ibid.*)

B. Referee's Report and Recommendations

In August 2010, Judge Gold issued his report and

recommendations regarding the funds Pauline diverted from the trust and Andersen estate while serving as trustee. He found that she diverted a total of $375,529.42: $136,163.05 from the trust, $194,512.23 of Wayne's separate property from the estate, and $44,854.14 in life insurance proceeds that should have been paid to Stephen and Kathleen. Judge Gold recommended that the trial court order Pauline to repay those amounts to the proper recipients—the trust, the estate, and Stephen and Kathleen, respectively—with 10 percent interest accruing from the dates of the original diversions.

The court adopted the recommendations with one modification not relevant here on September 13, 2010. Thus, as of that date, Pauline was obligated to repay a total of $375,529.42 in principal, plus 10 percent interest.

C. Continued Litigation

1. Malicious Prosecution Suit

In October 2011, Pauline and Taylor filed a malicious prosecution lawsuit against Stephen, Kathleen, and their attorney, John A. Belcher, in connection with the elder abuse claims the latter failed to prove. The trial court granted Belcher's anti-SLAPP motion to strike the allegations against him in October 2012. It also granted Belcher's follow-up motion for $60,783.49 in attorney fees and costs on January 11, 2013. The court dismissed the malicious prosecution claims against Stephen and Kathleen for failure to prosecute.

2. No-Contest Clause Petitions

In 2013, Pauline filed a petition alleging that the initial petition Stephen and Kathleen filed in 2006 violated the trust's no-contest clause. Stephen and Kathleen responded with similar allegations regarding Pauline's original petition to reform the

trust. The trial court found that neither of the initial petitions violated the no-contest clause. Both sides appealed, and we affirmed the trial court's rulings in a consolidated opinion in December 2015. (*In re Andersen Family Trust* (Dec. 1, 2015, B255546) [nonpub. opn.].)

IV. Petition to Distribute Funds

On November 7, 2016, Stephen and Kathleen filed a verified petition to compel the trustee to make a final distribution of the trust assets. Citing an accounting that is not in the appellate record, they alleged that the trust contained $1,764,302.90 as of August 31, 2016. They stated that Pauline's 60 percent share of that amount was $1,058,581.74, and that their 40 percent share was $705,721.16. Rather than request distribution of those amounts, Stephen and Kathleen asked the court to deduct from Pauline's share the entirety of the various sums the court ordered her to repay in September 2010, which they calculated to be $920,587.44 when interest was included. They further requested that the court deduct from Pauline's 60 percent share the fees and costs she owed attorney Belcher as a result of his successful anti-SLAPP motion, which they asserted totaled $98,702.39 with interest. They thus requested that the court distribute $39,291.91 to Pauline, $98,702.39 to Belcher, and a total of $1,626,308.60 to them, calculated as their 40 percent share of the trust ($705,721.16) plus the entireties of the sums Pauline owed to the trust ($340,143.73), the estate ($455,345.82), and to them as individuals ($125,097.89).

Pauline objected to the petition and requested an evidentiary hearing. She argued that the deductions from her share—and the distribution to Stephen and Kathleen—should be significantly lower. Pauline asserted that she should receive a

setoff of 60 percent of any funds due to the trust and the estate, due to the pour-over nature of Wayne's will and the 60-40 allocation dictated by the trust. She did not dispute Stephen and Kathleen's assertion that she owed $340,143.73 in principal and interest to the trust, but contended that she should only have to pay 40 percent of that ($136,057.49) because the terms of the trust entitled her to a distribution of 60 percent of the trust assets. Pauline made the same argument with respect to the $455,345.82 that Stephen and Kathleen claimed she owed the estate. Pauline further argued that no part of the judgment in favor of Belcher or the life insurance proceeds owed directly to Stephen and Kathleen should be deducted from her distribution.

The court heard the petition on May 12, 2017. At the outset of the hearing, the parties stipulated that the value of the trust assets as of that date was $1,658,567.81; that $10,000 of that would be "held back" as an administrative fee for the current trustee, Sunny Asch[6]; and that they would waive further accounting. Pauline reiterated her position that only 40 percent of the amounts she owed to the trust and the estate, including the accrued interest, should be deducted from her distribution, because she was entitled to a 60 percent share of trust assets. Stephen and Kathleen argued that Pauline should not receive a 60 percent share of the money she owed the trust due to "her ongoing obstruction" and failure to comply with the court's orders to account for and repay the money. That is, they contended that Pauline should "not receive a 60 percent giveback" or setoff of the amount owed.

At the hearing, the court rejected Stephen and Kathleen's

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[6]Asch ultimately received $16,000 when the funds were distributed.

position that Pauline should not receive 60 percent of the moneys she owed to the trust. However, it concluded that Pauline "should get no portion or no benefit of that delay" as represented by the 10 percent interest that had accrued on the principal amount she owed to the trust; "the interest would be solely payable against the account of Ms. Hunt." Thus, the only amount that would be split 60-40, or setoff from Pauline's distribution, would be the principal; "at the end of the day Ms. Hunt owes 40 percent of those sums owed and she owes all of the interest" accrued on the principal to Stephen and Kathleen. The court made the same oral ruling with respect to the money Pauline owed the estate: she was entitled to 60 percent of the principal, but none of the accrued interest, all of which would pass to Stephen and Kathleen.

The parties also argued about the propriety of deducting from Pauline's share the money she owed to Stephen and Kathleen for diverting the benefits of Wayne's life insurance policy, and the money she owed to Belcher as a result of the anti-SLAPP fee order. The court ordered further briefing on those issues. The additional briefing is not in the appellate record. Neither is a transcript of a subsequent hearing that was held on September 25, 2017, which is mentioned in the court's written distribution order.

As is relevant here, the written distribution order issued after the September 25, 2017 hearing comported with the remarks the court made at the May 12, 2017 hearing. The court began with a 60-40 split, but moved from Pauline's column to Stephen and Kathleen's 100 percent of the interest accrued on the diverted assets. The court also deducted from Pauline's share the judgment due to Belcher and the diverted life insurance

money due directly to Stephen and Kathleen. After the deductions, Pauline's distribution was reduced to $267,159.26; it was later adjusted to $285,673.12 when the trustee actually distributed the assets on Stephen and Kathleen's motion in February 2018.[7] Stephen and Kathleen ultimately received $1,017,469.01 when the funds were distributed.

Pauline timely appealed the order.

V. Petition for Attorney Fees

On December 22, 2016, approximately one month after Stephen and Kathleen filed their petition for distribution of the trust assets, Pauline filed a motion requesting attorney fees and costs from the trust "for defending the claims seeking to have the Trust declared irrevocable upon the death of Harriet[t] Andersen and that the trust amendments were invalid because of the lack of capacity of Wayne." She requested $811,460.56 for her current attorney, plus an additional $34,699.38 for two deceased attorneys who previously worked on the case. Stephen and Kathleen opposed the motion. The court held a hearing and concluded the motion was not supported by sufficient evidence, despite Pauline's inclusion of a 335-page "Timeslips Categorization Chart" prepared in support of the request. The court denied the motion without prejudice to Pauline refiling it as a petition. The transcript of the hearing is not in the appellate record.

On April 8, 2017, Pauline filed a petition requesting $531,613.65, for "legal work up through April 15, 2009," the date

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[7]The trial court ordered the assets distributed on February 14, 2018, "notwithstanding any appeal," after Pauline failed to post bond in the amount of $1,390,000.00 and her petition for supersedeas writ was denied.

she was removed as trustee. In addition to the substantial reduction in fees claimed, the petition omitted the request for fees on behalf of the deceased attorneys. Pauline proffered the same 335-page "Timeslips Categorization Chart" in support of the request, however. The chart included 82 pages of time entries dated after April 15, 2009. Many of the entries on the chart were redacted.

Stephen and Kathleen objected to and opposed the petition. They argued that Pauline was not entitled to fees because the actions she took as trustee did not benefit and in some instances harmed the trust. They further contended that the request was untimely, and that the delay was prejudicial because it made it difficult to evaluate the reasonableness of the fees. They also claimed that the hours billed were inflated, "unsupported and unreasonable," and did not align with a purported retainer that was not included with the petition.

The court heard the petition for fees in conjunction with the petition for distribution on May 12, 2017. After hearing argument from both sides, it stated that it was "going to deny the petition for fees." In its subsequent written order, filed September 19, 2017, the court made the following findings: (1) Pauline was removed as trustee for cause on April 15, 2009; (2) attorney fees incurred to litigate the distribution among the beneficiaries did not benefit the trust; (3) attorney fees incurred in connection with Pauline's "unsuccessful defense of charges against her did not benefit the trust"; (4) to the extent that some fees may have been incurred to benefit the trust, the court was unable to determine which fees those were; (5) the fees claimed "are not reasonable and not supported by any written retainer or invoices"; and (6) the eight-year delay in filing the petition was

prejudicial.

Pauline timely appealed the order.

DISCUSSION

I. Standing

Stephen and Kathleen contend that these appeals should be dismissed for lack of standing, because Pauline, now deceased, assigned her rights to the litigation to her grandson Taylor in 2008. We previously denied both of their motions to dismiss, one directed to Pauline's standing and one to Taylor's, on this basis. We again conclude that the appeals may proceed.

A. Background

Pauline died on February 2, 2018, after the notices of appeal were filed and shortly before the assets were distributed. No one has filed a motion, in the trial court or in this court, to substitute into the case as Pauline's successor in interest.

On February 7, 2018, Pauline's grandson, Taylor, requested that the trial court take judicial notice of a "Grant and Assignment" dated August 7, 2008, that he claimed was "located after being misfiled and subsequently lost several years ago." The Grant and Assignment, notarized and signed by both Pauline and Taylor, by its terms "grants, assigns, transfers, deeds and conveys all of the Settlor's right, title, and interest in and to any and all interests in certain property . . . to Taylor Profita as the Trustee of the Pauline Strong Hunt Family Trust. . . ." The property rights transferred to Taylor included "1. Any and all causes of action and/or claims that Settlor [Pauline] may have against the probate estate of Wayne Andersen ('Decedent'), and/or any trust with respect to which Decedent is or was a settlor, and/or any trust funded in whole or in part with assets included in whole or in part in the gross estate of Decedent; 2.

Any interest Settlor may have in any property or the fruits of any property which was included in whole or in part in the gross estate of Decedent; 3. Any and all causes of action and/or claims that Settlor may have against Stephen Andersen, Kathleen Brandt, John Andersen, . . . John Belcher, . . . and/or against any or all of them, and including any causes of action that Settlor may have against any subset(s) of the aforementioned people, and/or any trusts in which they or any of them have any interest."

In the Grant and Assignment, Taylor acknowledged his receipt of Pauline's trust estate and agreed to serve as its trustee. The appellate record contains no further information about the Grant and Assignment, the Pauline Strong Hunt Family Trust, or Pauline's estate. It is unclear from the record in this appeal whether the trial court granted Taylor's request for judicial notice of the document.

B. Analysis

"An appeal may be taken only by a party who has standing to appeal. [Citation.] This rule is jurisdictional." (*Sabi v. Sterling* (2010) 183 Cal.App.4th 916, 947.) Only a party who is "aggrieved" by the trial court's judgment has standing to appeal. (Code Civ. Proc., § 902.) A party is considered "aggrieved" only if its "'rights or interests are injuriously affected by the judgment.' [Citation.]" (*Sabi*, *supra*, 183 Cal.App.4th at p. 947.)

Stephen and Kathleen argue that "the claims advanced in this appeal are all injuries suffered purportedly by Pauline Hunt in the administration of the Andersen Family Trust," but Pauline "never had standing since August 7, 2008, when she assigned all her rights to the Pauline Strong [*sic*] Family Trust."[8] They point

[8]Stephen and Kathleen also point out, correctly, that "no

to *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal.App.4th 1394, 1402, which quotes another case for the proposition that an assignor of rights to a claim lacks standing to sue on that claim after he or she transfers the rights. *Searles Valley* is inapposite, however, because the litigation here was well underway by the time any transfer of rights was made.

Code of Civil Procedure section 368.5 governs here. (See Prob. Code, § 1000, subd. (a).) It provides: "An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest. The action or proceeding *may be continued in the name of the original party*, or the court may allow the person to whom the transfer is being made to be substituted in the action or proceeding." (Code Civ. Proc., § 368.5, emphasis added.) This provision gives trial courts the discretion to allow litigation to continue in the name of the original party rather than substitute the transferee. (*Hearn Pacific Corp. v. Second Generation Roofing* (2016) 247 Cal.App.4th 117, 133-134.) It appears that the trial court was unaware of the assignment until Taylor belatedly raised the issue. Nevertheless, no argument is made that the court would have abused its discretion by allowing the litigation to proceed under Pauline's name, and we discern no abuse on the record as it stands.

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person has properly substituted into this Appeal for in place of [*sic*] Pauline Hunt," but they do not make any argument or cite any authority supporting the proposition that standing is lacking for that reason. Moreover, there is no indication that they suffered or are suffering any prejudice from this continuing inexplicable procedural omission. (See *Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 957-959.)

None of the other authorities cited by Stephen and Kathleen demonstrate that standing is lacking here, at least as far as Pauline's interest is concerned. We accordingly conclude that our adjudication of the matter may proceed. (Cf. *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 540 [Code of Civil Procedure "section 902 is a remedial statute, which should be 'liberally construed,' with 'any doubts resolved in favor of the right to appeal.'"]).)

II. Distribution Order

A. Mootness

Stephen and Kathleen contend that Pauline's appeal from the distribution order should be dismissed as moot because the trustee already has distributed the trust assets. They rely on *In re Estate of Loring* (1946) 29 Cal.2d 423, 427-428 and *Estate of Buckhantz* (1958) 159 Cal.App.2d 635, 642, and cases that follow them, for the proposition that a decree of distribution that has become final conclusively determines the rights of trust beneficiaries.

Although those cases accurately state the law, they are not applicable to the situation at hand. The distribution order in this case is currently on appeal and therefore is neither final nor conclusive. (See *Estate of Page* (1967) 254 Cal.App.2d 702, 707, abrogated on other grounds by *Estate of Duke* (2015) 61 Cal.4th 871 ["*There having been no appeal* from that preliminary decree of distribution, it became final and controls the distribution of all property distributed to the trustees under its terms."]; *In re Callnon's Estate* (1969) 70 Cal.2d 150, 157 ["If the decree erroneously interprets the intention of the testator it must be attacked by appeal and not collaterally. [Citations.] *If not corrected by appeal* an 'erroneous decree . . . is as conclusive as a

decree that contains no error.'"].) The appeal is not moot merely because the assets are no longer in the trust; assets removed from a trust may be ordered to be returned.

B. Accrued Interest

Pauline contends that the distribution order "erroneously diverts interest owed exclusively to the trust to Stephen and Kathleen" and thereby "violates the trustor's intent and the law of the case." She argues that the interest accrued on money she diverted from the trust and estate during her tenure as trustee, 100 percent of which was awarded to Stephen and Kathleen, should have been divided according to the 60-40 split prescribed in the trust. We agree that the order must be reversed under any standard of review.[9]

In September 2010, the trial court adopted Judge Gold's recommendations and ordered Pauline, in her individual capacity, to repay amounts she had diverted from the trust, the estate, and life insurance proceeds. Specifically, the court ordered her to: (1) "pay to the successor trustee of the Andersen Family Trust, the sum of $209,469.31, together with interest on the $136,163.05 principal portion of said sum of $209,469.31 at the rate of 10% per annum from August 3, 2010 until Hunt pays said $136,163.05"; (2) pay "to the personal representative of the

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[9]Pauline urges us to review the order de novo. Stephen and Kathleen do not mention a standard of review but contend that the court's order was supported by equitable grounds, which suggests that an abuse of discretion standard would apply. (See *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 762 ["Whether a setoff is appropriate in equity is a question within the trial court's discretion. We review the trial court's decision under the abuse of discretion standard."].)

Estate of Wayne Andersen, Deceased, the sum of $280,413.74, together with interest on the $194,512.23 principal portion of said sum of $280,413.74 at the rate of 10% per annum from August 3, 2010 until Hunt pays said $194,512.23"; and, (3) "pay to Stephen Andersen and Kathleen Brandt, as individuals, in equal shares, the total sum of $77,038.52 plus interest on the $44,854.14 principal portion of said sum of $77,038.52 at the rate of 10% per annum from August 3, 2010 until Hunt pays said $44,854.14."[10] The order also authorized the trustee "to take such steps as are reasonable to collect" the sum due to the trust. Neither Pauline nor Stephen and Kathleen challenged the order via appeal or collateral attack.

Pauline delayed in satisfying the order for eight years, during which time substantial interest accrued on the amounts due. The record does not indicate that the successor trustee undertook any effort to collect the funds owed to the trust, despite the order's express provision authorizing her to do so. Likewise, there is no indication in the record that Stephen and Kathleen, in their roles as executors of Wayne's estate, took any action to collect the moneys owed to the estate. Instead, Stephen and Kathleen essentially requested that the court use the distribution order to punish Pauline's diversion of the funds and delay in complying with the order to repay the debt.

Punitive damages may be permissible in connection with a

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[10]The "principal portion of [each] sum" is the money Pauline was found to have diverted; the higher amount listed in connection with each diverted amount is the amount diverted plus the interest accrued thereon through August 3, 2010. For example, Pauline diverted $136,163.05 from the trust. With interest, the amount due to be repaid to the trust at the time the order was issued was $209,469.31.

breach of trust. (Rest.3d Trusts, § 100, com. (d) and additional general comment.) However, such damages are not legally supported here, as the trial court ruled in 2009 that it was "unable to find that Hunt's transfer of these assets, forgeries, false reimbursement claims, and concealment rise to the level of bad faith or intent to defraud the trustor, Wayne, and his heirs" and made no findings regarding the culpability of Pauline's post-2009 conduct. (See Civil Code, § 3294, subd. (a).) Furthermore, the penalty for any delay in repayment previously was set by the court as 10 percent interest; neither Stephen and Kathleen nor the trial court cited any authority for reallocating the interest as punitive damages for the delay, and we were not able to locate any.

Stephen and Kathleen contend the court's order nevertheless was proper as a matter of equity. They do not point to any authority that supports this proposition; the authority they characterize as "on all fours" with this case addresses whether a beneficiary of a spendthrift trust may have his or her distributive share impounded as a surcharge for breaching trustee duties. (See *Chatard v. Oveross* (2009) 179 Cal.App.4th 1098.) Although the probate court has discretion to "make any orders and take any other action necessary or proper to dispose of the matters presented by [a] petition" (§ 17206), its discretion is not boundless. One limitation on a trial court's discretion is that it may not set aside an order made by a previous judge, except in rare cases where the original order was inadvertently, mistakenly, or fraudulently made. (*Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1588.) Here, we agree with Pauline that the trial court exceeded that limitation by awarding the accrued interest exclusively to Stephen and

Kathleen rather than to the trust and estate as the prior judge ordered, without making any findings about her conduct post-dating that order.

Moreover, it is a longstanding common law rule that "interest follows principal," "'as the shadow the body.'" (*Phillips v. Washington Legal Foundation* (1998) 524 U.S. 156, 165-169, quoting *Beckford v. Tobin* (1749) 27 Eng.Rep. 1049, 1051.) Although the cases Pauline cites in support of this proposition are not factually similar to the instant case, the notion that interest should follow the principal on which it accrued is a sound one. If the trust were an individual judgment creditor, it would not be permissible to deprive it of the interest its delayed judgment payment had accrued. The same is true here, even though the end result is that the trust distributes 60 percent of that interest back to Pauline under the terms of the trust. As Stephen and Kathleen acknowledge, Pauline "is no different from any other judgment debtor who is liable for accrued interest."

The distribution order is reversed to the extent that it awards Stephen and Kathleen 100 percent of the interest accrued on the amounts due to the trust and estate. It is affirmed in all other respects.

III. Attorney Fees

Pauline contends that provisions of the trust authorized her to employ counsel at the trust's expense while she was acting as trustee,[11] and that all of the trial court's numerous grounds for

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[11]Pauline also contends that fees incurred after her removal as trustee were recoverable because the successor trustee "did nothing to defend the trustor's intent." However, the fee petition requested only those fees "spent in defending the trust . . . through April 15, 2009," the date on which she was removed as

denying the order for fees were "unsupported."

We review the trial court's order denying fees for an abuse of discretion. (*Kasperbauer v. Fairfield* (2009) 171 Cal.App.4th 229, 234.) "Allowance of litigation expenses rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal absent an abuse." (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1230 (*Whittlesey*).) We find no abuse of discretion here.

A trustee is statutorily authorized to reimbursement by the trust for "[e]xpenditures that were properly incurred in the administration of the trust" and "[t]o the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust." (§ 15684.) These expenditures include litigation necessary for preservation of the trust. (*Whittlesey, supra,* 104 Cal.App.4th at p. 1226.) To be reimbursable, however, litigation expenses must be "for the benefit of the trust estate." (*Id.* at p. 1227.)

"'The underlying principle which guides the court in allowing costs and attorneys' fees incidental to litigation out of a trust estate is that such litigation is a benefit and a service to the trust.' [Citation.] Consequently, where the trust is not benefited by litigation, or did not stand to be benefited if the trustee had succeeded, there is no basis for the recovery of expenses out of the trust estate." (*Whittlesey*, *supra*, 104 Cal.App.4th at p. 1230.)

In *Whittlesey*, as here, "[t]he essence of the underlying action was not a challenge to the existence of the trust; it was a dispute over who would control and benefit from it. Whether or not the contest prevailed, the trust would remain intact. . . . Whittlesey [a trust beneficiary] initiated the litigation

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trustee.

to have the amendment voided and to establish her rights in the trust. Margaret [another beneficiary and the new trustee, per the challenged amendment] defended the action to retain her competing rights in the trust." (*Whittlesey*, *supra*, 104 Cal.App.4th at p. 1228.) The facts of the instant case are virtually identical, though we held in our previous opinion that neither of the initial petitions in this case were "contests." (See (*In re Andersen Family Trust* (Dec. 1, 2015, B255546) [nonpub. opn.].) Stephen and Kathleen challenged the validity of the amendments that added Pauline as a beneficiary and successor trustee and reduced their shares. Pauline opposed their petition and filed her own petition to construe the trust and determine the validity of the trust amendments. To the extent she incurred fees to do so, she was seeking to benefit her own interests, not those of the trust or trustee. (See *Whittlesey*, *supra*, 104 Cal.App.4th at p. 1231.) Attorney fees are not warranted when "[t]he dispute was, and continues to be over who will enjoy the benefits and who will control the trust." (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1462 (*Terry*).)

Pauline contends that *Whittlesey* and *Terry*, which involved an even more analogous dispute between a decedent's widow and his three adult children from a previous marriage, are distinguishable. (See *Terry*, *supra*, 131 Cal.App.4th at p. 1448.) We disagree. In *Terry*, as here, "there is no current dispute, nor has there ever been a dispute between the parties that [the decedent] placed his property in trust while he was alive. The dispute between Ione [his widow] and the Children is over the validity of the various trust instruments and amendments." (*Id.* at p. 1464.) There, as here, the trustee, one of the children in that case, "has not participated in this litigation as a neutral

trustee to defend the trust and protect its assets; rather, she has consistently pursued her own interests and those of her siblings, to the detriment of Ione. As such, she must bear her own costs in this litigation, rather than be reimbursed from the trust." (*Ibid.*) The same can be said of Pauline here.

Pauline points to *Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529, 537-538 (*Doolittle*), but that case does not assist her. The *Doolittle* court discussed *Whittlesey* and noted that its "decision and reasoning . . . were approved and followed in *Terry v. Conlan* [ ] under similar circumstances." (*Doolittle*, *supra*, 241 Cal.App.4th at p. 538.) That is, it acknowledged those cases remain good law. The *Doolittle* court distinguished *Whittlesey* and *Terry* based on the wording of the trust documents in those cases, which "did not contain an explicit directive to the trustee to defend claims challenging the validity of the amendment at the trust's expense." (*Ibid.*) We find *Whittlesey* and *Terry* much more factually analogous to the instant cases and therefore persuasive. As in both *Whittlesey* and *Terry*, the litigation here primarily concerned the validity of the amendments to the trust and Pauline's own alleged wrongdoing in securing them, not claims against or in favor of the trust or for its benefit.

Moreover, as Stephen and Kathleen pointed out and the trial court found, Pauline waited more than seven years after her removal as trustee to seek reimbursement of attorney fees. Counsel attributed the delay to three appeals in the matter: Pauline's appeal of the trial court's judgment after the trial, and the cross-appeals concerning the no-contest clause petition. The trial court found that the delay was prejudicial.

Pauline contends that finding is "unfounded," and that "[t]he inchoate claim of prejudice dues [*sic*] to delay is a make-

work excuse," because Stephen and Kathleen "had at their disposal exactly the record and material necessary to evaluate a fees claim": their own counsel's bills. At oral argument, counsel also suggested that the court could and should have elucidated and awarded at least some fees. We are not persuaded. The trial court's finding was supported by the evidence and was not an abuse of discretion. In the lengthy period between when Pauline incurred the fees and when she sought reimbursement for them, some of her counsel died. Their bills had to be estimated and recreated in Pauline's initial motion for fees. Although Pauline ultimately withdrew her request for fees for those counsel, the trial court reasonably could have concluded that the 335-page redacted spreadsheet her counsel prepared for purposes of the initial motion and resubmitted, unchanged, with the petition was equally prejudicial. Counsel did not provide a reason for his recreation of bills, and the substantial redactions, coupled with the passage of time, render it difficult to conclude what work was billed for and why. To the extent Pauline claims that "at least *some* fees were reasonably due," she fails to specify which fees, or how the court erred in denying her request for them.

For all of these reasons, the trial court did not abuse its discretion in denying the petition for attorney fees. The order denying attorney fees is affirmed.

DISPOSITION

The distribution order is reversed. On remand, the trial court is directed to award Pauline 60 percent of the accrued interest on the amounts it previously ordered her to repay to the trust and estate. The order denying attorney fees is affirmed. The parties are to bear their own costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.